UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAMES B. MILLER, Petitioner, v. JOSEPH LEHMAN, et al., Respondents.	CASE NO. C04-0671JCC REPORT AND RECOMMENDATION

Petitioner proceeds with counsel in this 28 U.S.C. § 2254 habeas corpus action. Petitioner was convicted on June 9, 2000 of second-degree assault and sentenced to 45 months incarceration and a 12 month term of community placement. (Dkt. 17, Ex. 2.) He was released from prison on July 14, 2003 and began his community placement, which was to be completed on July 13, 2004.

Petitioner contends he was denied his Sixth Amendment right to effective assistance of counsel and enumerates nine different instances of his counsel's ineffectiveness. (Dkt. 1.) The petition is now ripe for consideration. Respondents filed an answer to the petition with relevant portions of the state court record, including trial transcripts. (Dkts. 14 & 17.) Respondents argue that petitioner failed to properly exhaust the bulk of his claims and that the remaining exhausted claims lack merit.

Petitioner moved to strike respondents' answer (Dkt. 20), submitted a traverse (Dkt. 19), and filed a motion for leave to take the deposition of, and subpoena relevant records from, his

former trial attorney. (Dkt. 21.) Within his traverse, petitioner rejected the contention that he failed to exhaust any of his ineffective assistance of counsel claims, requested an evidentiary hearing, and declined to address the merits of his claims prior to the Court ruling on his requests for discovery and an evidentiary hearing.

The Court denied petitioner's motion to strike respondents' answer, requested a complete response from petitioner as to the merits of his claims, and renoted petitioner's petition and discovery motion for the Court's consideration. (Dkt. 25.) Petitioner subsequently submitted a complete response as to the merits of his claims (Dkt. 26), to which respondents did not reply. Respondents object to both petitioner's discovery request and his request for an evidentiary hearing. (Dkts. 14 & 23.)

The Court has considered the record relevant to the grounds raised in the petition, including all hearing transcripts. For the reasons discussed herein, it is recommended that petitioner's habeas petition, along with his request for discovery and an evidentiary hearing, be denied, and this action dismissed.

I

The Washington Court of Appeals summarized the facts surrounding petitioner's conviction as follows:

> The facts leading up to the assault [with a deadly weapon] were disputed at trial. Miller's former friend, John Parezanin, testified that Miller was an alcoholic, and that he had been trying to assist Miller with his problems. On March 22, 1999, Parezanin learned that Miller had checked himself out of a hospital, and went to his home.[1] When Parezanin arrived that evening, Miller was so intoxicated that he urinated on himself.
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> Miller later fell asleep. When he awoke at approximately 5:30 a.m., he attempted to leave and drive to a liquor store. Believing that Miller was still intoxicated, Parezanin would not let him leave. Miller became angry. He stated, "I am going to clean this up," and grabbed a shotgun. He pumped a shell into the chamber, and turned to aim the gun at Parezanin. Parezanin testified that there was no doubt in his mind that Miller was going to shoot him. Before Miller could point the gun directly at him, Parezanin grabbed the gun away. Parezanin hid the gun

[1] Parezanin was accompanied by Alex Romero, who did not testify at trial.

around the corner, and left.

Miller's story differed significantly. He testified that he had left the hospital because he did not like the medication he was being given, and that he was still sedated when he left.[2] He claimed that Parezanin did not arrive at his house until the next morning, and that it was daylight when he arrived. Miller denied being an alcoholic, and stated that he did not remember drinking that morning or the prior evening.[3]

Miller testified that Parezanin was upset about the way Miller was handling his divorce, and began screaming at him as soon as he arrived. Miller asked Parezanin to leave. When he refused, Miller started toward the door. According to Miller, Parezanin grabbed a baseball bat, raised it over his head and told Miller that if he tried to leave, he would do some "serious" damage to him. Miller was scared and wanted to leave. He took his gun, and told Parezanin that he would make an opening for his "egress." Miller admitted that he picked the gun up to create fear and apprehension in Parezanin, and that the statements he made that night were intended to intimidate Parezanin. He testified that it had "seemed like a good idea to blow a hole in the wall and walk through it." But he also claimed that the gun was not loaded. Miller testified that after Parezanin left, he locked the door and loaded his shotgun.

The police arrived at Miller's home later that morning after being contacted by Parezanin. Miller smelled of alcohol and urine. The police found Miller's gun, which had a shotgun shell in the chamber. Miller was cooperative and responsive during police questioning, and seemed intelligent and "sharp." Miller gave a statement to the police, which differed from his trial testimony. He admitted to police that the argument became heated because he had attempted to go out and buy a bottle of wine. He stated that Parezanin threatened to crush his face if he left, but did not mention a baseball bat. He told the police that he had picked up his shotgun and said that he would make a hole big enough to walk through. He admitted to the police that the gun had been loaded at the time.

At trial, Miller presented a lawful force defense. In closing argument, Miller's counsel conceded that "[i]t's assault if he picks up the gun and does anything threatening" and that a "shotgun displayed in a threatening manner is sufficient to constitute assault two in the State of Washington . . . ." Miller was convicted as charged and given a standard range sentence with a deadly weapon enhancement.

(Dkt. 17, Ex. 4. at 1-4.)

Miller appealed his conviction to the Washington Court of Appeals. (*Id.*, Ex. 3.) His

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[2] The defense did not produce testimony or other evidence as to what medication Miller was taking, or any expert testimony about the effects of the medication.

[3] Miller's girlfriend [(Pauline Oxford)] testified that she had been with Miller from approximately 9:30 p.m. on the 22nd until 1:30 a.m. on the 23rd, that Miller had drunk only one mixed drink and one glass of wine over the course of the entire night, and that he had no odor of alcohol about him.

counsel raised the following grounds for review:

> 1. Should the jury verdict of guilty on this charge of second degree assault be reversed where the defendant was in his own home, displayed but did not point a gun at the "victim", and there is no direct evidence of a specific intent on the part of the defendant to cause the "victim" fear or apprehension of imminent bodily harm? (Assignment of Error #1)
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> 2. Did the defendant receive ineffective assistance of counsel where his attorney (1) failed to present a case theory mandated by absence of evidence of an essential element of second degree assault; (2) failed to assert a statutory defense to the charge of assault in the second degree; (3) failed to raise the defense of diminished capacity; (4) failed to present evidence of bias or motive on the part of the "victim"; and (5) misstated the law regarding assault during closing arguments and asserted that the actions of the defendant did constitute assault? (Assignment of Error #2)

(*Id*. at 2.) The Washington Court of Appeals affirmed the conviction and sentence. (*Id*., Ex. 4.)

Petitioner moved for reconsideration. (*Id*., Ex. 5.) He argued as follows:

> The evidence in the record is insufficient to support a conviction for assault in the second degree. Properly presented, no rational jury could convict Mr. Miller of that crime. Mr. Miller's trial counsel failed in numerous aspects to provide a minimally necessary defense to the crime of assault in the second degree. This court should reconsider its decision in light of the entire record, which contains numerous failures by trial counsel, to prevent a gross injustice.

(*Id*. at 2-3.) However, before the Court of Appeals could rule on his motion for reconsideration, petitioner petitioned the Washington Supreme Court for review. (*Id*., Ex. 6.) His counsel raised the following grounds for review:

> 1. Was their [sic] insufficient evidence of the element of intent to cause the victim to be placed in fear, such that it violates the Due Process Clause of the Fourteenth Amendment to find the petitioner guilty of Assault in the Second degree?
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> 2. Was the petitioner's Sixth Amendment right to effective assistance of counsel violated when, during closing argument, his trial attorney's [sic] misstated the elements of the crime charged and eliminated the specific intent element?
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> 3. Was the petitioner's Sixth Amendment right to effective assistance of counsel violated by his trial attorney's failure to request instructions on, or to argue the defenses of, voluntary intoxication and diminished capacity?
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> 4. Was the petitioner denied his constitutional right to effective assistance of counsel on appeal when his appellate counsel failed to follow the correct procedure for presenting evidence of facts outside the record, and attempted to raise claims of ineffective assistance of counsel on direct appeal?

(*Id*.) The Washington Supreme Court denied his petition and, on May 13, 2002, the Washington Court of Appeals issued its mandate. (*Id*., Exs. 7 & 8.)

On April 28, 2003, petitioner filed a personal restraint petition. (*Id*., Ex. 9.) His counsel raised the following grounds for review:

> 1. Trial counsel's failure to object to police officer testimony that included hearsay statements from two witnesses, and the failure to object to the officer's testimony that he found these two witnesses to be credible, constituted a denial of the Sixth Amendment right to effective representation of counsel.
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> 2. Trial counsel's failure to offer the baseball bat in evidence to support his client's testimony and the theory of self-defense, constituted a denial of the Sixth Amendment right to effective representation of counsel.
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> 3. Trial counsel's failure to call Pauline Oxford as a rebuttal witness, to counter the prosecution's accusation that the defendant's testimony about a baseball bat was a recent fabrication, constituted a denial of the Sixth Amendment right to effective representation of counsel.
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> 4. Trial counsel's erroneous statement, that the defendant could not lawfully *offer* to use deadly force unless he had first been threatened with great bodily harm, was a misstatement of the law, and this misstatement constituted a denial of the Sixth Amendment right to effective representation of counsel.
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> 5. Trial counsel's failure to argue in closing that the defendant had the lawful right to use force to prevent an offense against his person, constituted a denial of the Sixth Amendment right to effective representation of counsel.
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> 6. Trial counsel's failure, to present evidence that the continuing effect of recently administered hospital medications reduced Miller's ability to think and perceive clearly, constituted a denial of the Sixth Amendment right to effective representation of counsel.
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> 7. The combination of trial counsel's failures and mistakes listed above, together with the deficiency previously recognized by the Court of Appeals on direct appeal (where the Court found that it was deficient conduct to misstate the law defining the crime of assault and thereby to relieve the State of its burden of proof on an element of the crime), had a cumulative effect of denying petitioner his Sixth Amendment right to effective representation of counsel.

(*Id*. at 15-17.) The Washington Court of Appeals denied the petition. (*Id*., Ex. 10.)

Petitioner petitioned the Washington Supreme Court for review. (*Id*., Ex. 11.) His counsel raised the following grounds for review:

> 1. Did Judge Cox violate RAP 16.11(b) by dismissing a PRP which he

had failed to find frivolous, instead of referring it to a three judge panel for a decision on the merits as the rule requires?

2. Did the failure to refer the PRP to a three judge panel deprive Miller of procedural due process?

3. Did Judge Cox commit obvious error when he concluded that Deputy Griffee's testimony was not hearsay, and that trial counsel's failure to object to it did not constitute ineffective assistance of counsel?

4. Did Judge Cox commit obvious error when he rejected Miller's claim that his trial attorney's failure to offer the baseball bat in evidence constituted ineffective assistance of counsel?

5. Did Judge Cox commit obvious error by failing to address Miller's claim that his trial attorney's failure to call Pauline Oxford as a witness constituted ineffective assistance of counsel?

6. Did Judge Cox commit obvious error in failing to address Miller's IAC claim that his trial attorney misstated the law of self-defense in closing?

7. Did Judge Cox commit obvious error in rejecting Miller's IAC claim that his attorney failed to investigate and to present evidence of the effects of medication withdrawal on his ability to form intent?

(*Id*. at 1-2.) The Washington Supreme Court denied review on March 19, 2004. (*Id*., Ex. 12.)

II

Petitioner contends his conviction was contrary to his Sixth Amendment right to effective representation and identifies nine different acts or omissions of his trial counsel as constituting deficient and prejudicial conduct:

(1) Failure to object to the testimony of Deputy Griffee on the grounds that it included hearsay from two declarants;

(2) Failure to object to the testimony of Deputy Griffee that he found the statements made by the two hearsay declarants to be credible;

(3) Failure to offer in evidence as an exhibit at trial, the baseball bat used by witness John Parezanin, to illustrate why petitioner acted in self-defense;

(4) Failure to call Pauline Oxford as a rebuttal witness, to counter the prosecution's accusation that Miller's testimony about the baseball bat was a recent fabrication;

(5) Stating (erroneously) in closing argument that the defendant (Miller) could not lawfully *offer* to use deadly force unless he had first been threatened with

great bodily harm;

(6) Failing to state in closing argument that Miller had the lawful right to use force to prevent an offense against his person;

(7) Failing to adequately investigate the possible defense of diminished capacity by failing to take the steps necessary to learn about the adverse side effects of the medication that Miller had been taking shortly before the alleged criminal event;

(8) Failing to present evidence that the continuing effect of recently administered hospital medications reduced Miller's ability to be able to think and perceive clearly;

(9) Stating (erroneously) in closing argument that the crime of assault was committed if Miller picked up a gun and did anything threatening, thereby eliminating the element of intent to create fear or apprehension.

(Dkt. 1 at 5-6.)

Respondents assert that petitioner failed to properly exhaust and procedurally defaulted all but his seventh, eighth, and ninth claims for relief and that, even if the Court found all of petitioner's claims properly exhausted, those claims fail on the merits because petitioner's trial counsel's performance was objectively reasonable. The Court will address respondents' exhaustion and procedural bar argument first.

III

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). To exhaust state remedies, a petitioner must present each of his claims to the state's highest court. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); *James v. Borg*, 24 F.3d 20, 24 (9th Cir. 1993). A petitioner must "alert the state courts to the fact that he was asserting a claim under the United States Constitution." *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999) (citing *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995)). "The mere similarity between a claim of state and federal error is insufficient to establish exhaustion." *Id.* (citing *Duncan*, 513 U.S. at 366). "Moreover, general appeals to broad constitutional principles, such as due process, equal protection, and the

right to a fair trial, are insufficient to establish exhaustion." *Id.* (citing *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996)).

Pursuant to RCW 10.73.090, no petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than a year after the judgment becomes final. Additionally, if the state court expressly declined to consider the merits of a ground based on an independent and adequate state procedural rule, or if an unexhausted ground would now be barred from consideration by the state court based on such a rule, a petitioner must demonstrate a fundamental miscarriage of justice, or cause, *i.e.* some external objective factor that prevented compliance with the procedural rule, and prejudice, *i.e.* that the claim has merit. *See Coleman v. Thompson*, 501 U.S. 722, 735 n.1, 749-50 (1991); *Harris v. Reed*, 489 U.S. 255, 263 (1989).

Respondents argue that, in failing to present them as the same claims, both factually and legally, in both his federal habeas petition and his petition for review in the Washington Supreme Court, petitioner failed to properly exhaust and procedurally defaulted all but his seventh, eighth, and ninth claims for relief. Respondents note that, while presenting these claims as federal constitutional violations in his personal restraint petition, petitioner thereafter presented the claims as errors of the Chief Judge of the Washington Court of Appeals in his petition for review before the Washington Supreme Court. (*See* Dkt. 17, Exs. 9 & 11.)

Petitioner disputes respondents' contention as to exhaustion. He asserts that, while he phrased his grounds for relief in terms of the standard for a motion for discretionary review before the Washington Supreme Court, *see* Washington Rule of Appellate Procedure 13.5(b) (considering whether the Court of Appeals committed "obvious error"), the substantive issues remained the same as those presented in his personal restraint petition.

The Court finds all of petitioner's grounds for relief properly exhausted. All of the claims in petitioner's motion for discretionary review allege ineffective assistance of counsel (sometimes shortened to "IAC") and/or reference *Strickland v. Washington*, 466 U.S. 668, 687 (1984), the case setting the standard for evaluating Sixth Amendment ineffective assistance of counsel claims.

(*See* Dkt. 17, Ex. 11.) The Court finds these references sufficient to put the Washington Supreme Court on notice of the federal nature of petitioner's claims. *See, e.g.*, *Sanders v. Ryder*, 342 F.3d 991, 999-1001 (9th Cir. 2003) ("[D]epending on the context of his claim, a prisoner may alert a state court to the federal nature of the asserted right by using the phrase 'ineffective assistance of counsel.'"; finding petitioner's repeated references to "ineffective assistance of counsel" sufficient), *cert. denied sub nom. Moore v. Sanders*, ___ U.S. ___ , 124 S. Ct. 1661, 158 L. Ed. 2d 392 (2004). As such, the Court must consider the merits of all of petitioner's ineffective assistance of counsel claims.

IV

As noted above, petitioner requests both discovery and an evidentiary hearing. Although petitioner maintains the need for an evidentiary hearing generally, this request appears primarily related to his trial counsel's inaction with respect to a baseball bat allegedly wielded by John Parezanin, and alleged failure to investigate and pursue a diminished capacity defense. (*See* Dkt. 26 at 9, 26.) Petitioner maintains the need for an evidentiary hearing so that the Court can assess both his credibility and the credibility of witness Pauline Oxford, versus that of his trial counsel, Michael Danko, on these issues. In his discovery request, petitioner seeks to depose and obtain documents from Danko.

Respondents argue that petitioner fails to show good cause for discovery and assert the sufficiency of the records before the Court to determine petitioner's habeas claims. Respondents further argue that petitioner is not entitled to an evidentiary hearing given his failure to satisfy the requirements of 28 U.S.C. § 2254(e)(2). While disagreeing that reference to § 2254(e)(2) resolves the issue, the Court agrees that neither discovery, nor an evidentiary hearing is appropriate in this matter.

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), state court findings of fact are presumptively correct in federal habeas proceedings, and the petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. 28

U.S.C. § 2254(e)(1). Pursuant to § 2254(e)(2), if the petitioner failed to develop the factual basis of a claim in state court, the federal court may not hold an evidentiary hearing on that claim unless:

> (A) the claim relies on –
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

Failure to develop a claim's factual basis in state court is not established unless there is a lack of diligence, or some greater fault, attributable to the petitioner or his counsel. *Williams v. Taylor*, 529 U.S. 420, 437 (2000); *Baja v. Ducharme*, 187 F.3d 1075, 1078-79 (9th Cir. 1999). A habeas petitioner has not failed to develop the factual basis of a claim where he was denied an evidentiary hearing in state court. *Jones v. Wood*, 114 F.3d 1002, 1013 (9th Cir. 1997). Here, petitioner sought and was denied an evidentiary hearing in state court. (*See* Dkt. 17, Exs. 9 & 10.) As such, because petitioner cannot be said to have failed to develop the factual basis of his claims, § 2254(e)(2) does not preclude an evidentiary hearing in this matter.

However, the mere fact that an evidentiary hearing is not precluded by § 2254(e)(2) does not entitle petitioner to such a hearing. *Downs v. Hoyt*, 232 F.3d 1031, 1041 (9th Cir. 2000); *McDonald v. Johnson*, 139 F.3d 1056, 1059-60 (5th Cir. 1998). Instead, the Court retains discretion to determine whether an evidentiary hearing is appropriate or required under the pre-AEDPA standard governing evidentiary hearings. *Baja*, 187 F.3d at 1078. *See also Downs*, 232 F.3d at 1041; *McDonald*, 139 F.3d at 1060. Pursuant to that standard, a petitioner is entitled to an evidentiary hearing where: (1) petitioner's allegations, if proven, would establish the right to relief; and (2) the state court trier of fact has not, after a full and fair hearing, reliably found the relevant facts. *Jones*, 114 F.3d at 1010. "[A]n evidentiary hearing is *not* required on issues that

can be resolved by reference to the state court record." *Totten v. Merkle*, 137 F.3d 1172, 1176 (9th Cir. 1998) ("It is axiomatic that when issues can be resolved with reference to the state court record, an evidentiary hearing becomes nothing more than a futile exercise.") "In determining whether an evidentiary hearing is proper, the district court may expand the record and consider affidavits, exhibits, or other materials that cast light on the merits of the petition." *McDonald*, 139 F.3d at 1060.

Following an independent review of the record, the Court concludes that an evidentiary hearing is both unnecessary and inappropriate. The issues in this case may be resolved by reference to the state court record, which includes, *inter alia*, a letter from Danko solicited by petitioner's counsel and declarations from petitioner, Oxford, and a criminal defense attorney rendering his opinion as to petitioner's claims, all of which petitioner submitted with his personal restraint petition. (Dkt. 17, Exs. 9-9b, 10.) Moreover, based on the entire record now before the Court, including a declaration submitted by Danko elaborating upon the explanations in the letter provided to the state courts (*Id.*, Ex. 13), the Court does not find that petitioner's allegations, if proven, would establish his right to relief.

The Court likewise finds the requested discovery unnecessary. Rule 6(a) of the Rules Governing Section 2254 Cases provides that: "A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise." To show good cause, petitioner must set forth specific facts showing discovery is appropriate. *Deputy v. Taylor*, 19 F.3d 1485, 1493 (3d Cir. 1994) (citing *Mayberry v. Petsock*, 821 F.2d 179, 185 (3d Cir. 1987)). Because the Court finds the record sufficient to determine petitioner's right to habeas relief, it concludes that petitioner lacks good cause to conduct the requested discovery.

V

This Court's review of the merits of petitioner's remaining claims is governed by 28 U.S.C.

§ 2254(d)(1). Under that standard, the Court cannot grant a writ of habeas corpus unless a petitioner demonstrates that he is in custody in violation of federal law and that the highest state court decision rejecting his grounds was either "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(a) and (d)(1). The Supreme Court holdings at the time of the state court decision will provide the "definitive source of clearly established federal law[.]" *Van Tran v. Lindsey*, 212 F.3d 1143, 1154 (9th Cir. 2000), *overruled in part on other grounds by Lockyer v. Andrade*, 538 U.S. 63 (2003). A state-court decision is contrary to clearly established precedent if it "'applies a rule that contradicts the governing law set forth in'" a Supreme Court decision, or "'confronts a set of facts that are materially indistinguishable'" from such a decision and nevertheless arrives at a different result. *Early v. Packer*, 537 U.S. 3, 8 (2002) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-406 (2000)).

Petitioner alleges ineffective assistance by Danko, his trial counsel. The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. *Strickland*, 466 U.S. at 687. Courts evaluate claims of ineffective assistance of counsel under the two-prong test set forth in *Strickland*. Under that test, a defendant must prove that (1) counsel's performance fell below an objective standard of reasonableness and (2) a reasonable probability exists that, but for counsel's error, the result of the proceedings would have been different. *Id*. at 687-694.

When considering the first prong of the *Strickland* test, judicial scrutiny must be highly deferential. *Id.* at 689. There is a strong presumption that counsel's performance fell within the wide range of reasonably effective assistance. *Id*. The Ninth Circuit has made clear that "'[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" *Campbell v. Wood*, 18 F.3d 662, 673 (9th Cir. 1994) (quoting *Strickland*, 466 U.S. at 689).

The second prong of the *Strickland* test requires a showing of actual prejudice related to

counsel's performance. The reviewing court need not address both components of the inquiry if an insufficient showing is made on one component. *Strickland*, 466 U.S. at 697. Furthermore, if both components are to be considered, there is no prescribed order in which to address them. *Id*.

Testimony of Deputy Griffee

Petitioner's first and second grounds for relief relate to the testimony of Deputy Griffee, one of the arresting officers. Petitioner points to Danko's failure to object to this testimony as including hearsay from two declarants, as well as the assertion that Deputy Griffee found the statements of those declarants credible.

Deputy Griffee testified as follows:

> We were called to a residence in the north part of Burien, the 1800 block of 26th Avenue Southwest, where we met with two men who told us that that [stet] another person had pointed a shotgun at one of them, and we took statements from them. They seemed like credible witnesses and a victim to us. And then we went to the person's house where they said this had occurred, and we took that person into custody and recovered the shotgun.

(Dkt. 17, Ex. 15 at 4:13-22.) Danko explained his failure to challenge Deputy Griffee's testimony in the letter provided to the state courts:

> After reviewing the transcript you recently provided, my recollection is clear about passing on an objection to opinion evidence. While I no longer have the discovery, I now recall the officer's report including his opinion. As my cross-examination shows, I brought it up in order to capitalize on it. Knowing my client was going to testify, I wanted to bolster his credibility. My cross was intended to show Mr. Miller was no less credible, having the officer acknowledge he did not know any of the witnesses, was passing off an unfounded opinion, and that Mr. Miller, by being responsive and cooperative, should be deemed credible by the jury.

(*Id*., Exs. 9a & 18.)

In considering petitioner's claims as to this testimony, the Washington Court of Appeals held:

> Miller first contends that his trial attorney was ineffective for failing to object to the testimony of one of the arresting officers. The officer testified that he responded to a call and met two men who told him that a person (Miller) had pointed

> a shotgun at them. The officer testified that he took statements from the two men, and noted that they seemed like credible witnesses. The officer then testified that he went to Miller's home, took him into custody, and took the shotgun from him.
>
> Miller contends that his trial counsel was ineffective for failing to object to this testimony on two bases. First, he contends that the officer's testimony contained hearsay, in that he testified about what the men told him. But it appears that the statement was not offered for the truth of the matter asserted. Rather, the testimony was offered to explain why the officer took the actions that he did. The testimony was not hearsay, and Miller's trial counsel was not ineffective for failing to object to the testimony. Moreover, Miller is unable to demonstrate prejudice, as it was uncontested that Miller brandished a shotgun.
>
> Miller also contends that his counsel was ineffective for failing to object to the testimony, arguing that the officer improperly vouched for the credibility of the witnesses. But the officer's comment was made in passing during a lengthy trial. The decision not to object could reasonably be described as a legitimate trial tactic, as objecting to the remark may well have simply drawn further attention to it. Moreover, it cannot be said that this isolated remark made a difference in the trial. Miller has failed to demonstrate deficient performance or prejudice.

(*Id.*, Ex. 10.) In denying discretionary review, the Washington Supreme Court noted petitioner's argument that the Acting Chief Judge applied the wrong standard for determining prejudice and stated: "But Mr. Miller does not persuasively show that the Acting Chief Judge applied a higher standard, nor, in any event, does he convince me there is a reasonable probability that the errors he complains of affected the outcome." (*Id.*, Ex. 12.)

The Court finds the state courts' adjudication of these issues neither contrary to, nor involving an unreasonable application of, clearly established federal law. The Washington Court of Appeals found Danko's failure to object to Deputy Griffee's statement regarding credibility a legitimate tactical choice, a conclusion supported by Danko's letter. "A reasonable tactical choice . . . is immune from attack under *Strickland*." *Gerlaugh v. Stewart*, 129 F.3d 1027, 1033 (9th Cir. 1997) (citing *Strickland*, 466 U.S. at 689-91). Petitioner fails to demonstrate that such a tactical choice fell below an objective standard of reasonableness.

Moreover, the state courts reasonably concluded that no prejudice resulted from Danko's failure to object either on the basis of the credibility statement or on the grounds of hearsay. As noted by the Washington Court of Appeals, the fact that petitioner brandished a shotgun, as

asserted by the two declarants, was never contested. The Court further agrees that, given the isolated nature of Deputy Griffee's credibility comment, it cannot be said that Danko's failure to object prejudiced petitioner's case. The relative insignificance of this comment is demonstrated by Deputy Griffee's testimony on cross-examination that he had never met either declarant before taking their statement, that he had nothing further at the time to verify the information they provided, and his agreement that petitioner was "completely cooperative during the entire contact[.]" (Dkt. 17, Ex. 15 at 13:15-14:13.)

Accordingly, for all of the reasons described above, the Court recommends that petitioner be denied habeas relief as to his first and second grounds for relief.

Baseball Bat

Petitioner alleges Danko's ineffectiveness in failing to offer into evidence the baseball bat allegedly used by John Parezanin, in order to support petitioner's claim of self defense. Petitioner also challenges Danko's failure to call Pauline Oxford as a rebuttal witness to counter the prosecution's accusation that his testimony about the baseball bat was a recent fabrication.

In the letter supplied to the state courts, Danko stated:

> The transcript also contains Mr. Parenazin's testimony. You will note that he was not asked anything about a bat by the State or by me. Mr. Miller, in his statement to the police after his arrest did not include any reference to a bat. Mr. Miller and I met a number of times prior to going to trial. He had numerous other issues – his DUI, business, family – as well as the Assault Two trial. I do not recall when he first brought up the bat, but it was definitely after he had rejected the diminished capacity defense. At a subsequent meeting, I remember asking him about it again, and it was at that time that he told me he 'made it up' because it would be better for his self defense claim. I explained to him my ethical obligation prohibiting a proffer of false testimony. The subject come [stet] up on other occasions, and my response remained the same, and I told him that if he persisted, I would have to withdraw. Shortly before trial, and again during trial and before he testified, we reviewed the testimony and he acknowledged that the bat would not be brought up during his testimony. I went over each part of his testimony carefully, knowing him as I did to easily get unfocused. The last conference occurred after Mr. Parezanin had testified. Obviously, if the evidence was credible, I surely would have presented it through Mr. Miller, and I surely would have questioned Mr. Parezanin about it during cross-examination. However, when I asked the question about anything in Mr. Parezanin's hands, I expected the answer to be "no". The next question to be asked then was one which would have elicited from Mr. Miller how easily Mr. Parezanin stepped over and took the gun from his hands. This would have been consistent with my opening

statement and Mr. Miller's claim of not intending to assault anyone.

(Dkt. 17, Exs. 9a & 18.) In declarations from petitioner and Oxford, petitioner denied fabricating a story about the baseball bat and Oxford described meetings with petitioner and Danko in which the bat was discussed, as well as the bat's presence in the back seat of petitioner's car on each day of the trial. (*Id.*, Ex. 9b.)

In dismissing petitioner's personal restraint petition as to these claims, the Washington Court of Appeals held as follows:

> Miller next argues that his attorney was ineffective for failing to introduce into evidence a baseball bat with which Miller alleges the victim threatened him. According to Miller's trial counsel, he did not introduce the bat because Miller told him before trial that he had lied about the victim threatening him with a bat. Miller denies this allegation. Miller's counsel argues that this creates a factual dispute that should be resolved in a reference hearing.
>
> At trial, Miller testified on cross-examination that he acted in self-defense, and that his actions were reasonable because the victim had threatened him with a baseball bat. In this petition, Miller contends that if his attorney had presented the alleged bat into evidence, this would have bolstered his case. But even had a bat been admitted into evidence, this would not change the fact that he had not mentioned the bat to police earlier, that the police saw no bat at the scene, and that no other witnesses saw a bat. And Miller fails to demonstrate that the alleged bat could be tied in any way to the victim, such as by fingerprints or the like. Simply put, admission of a bat into evidence would not reasonably have made a difference at trial, particularly given Miller's earlier statements to police.

(*Id.*, Ex. 10.) In denying petitioner's motion for discretionary review, the Commissioner of the Supreme Court of Washington added:

> The next claimed error was counsel's failure to call a witness who purportedly would have testified that Miller told her about the bat and showed it to her several days after the incident. But the Acting Chief Judge properly determined that failure to produce the bat did not prejudice Miller. The witness's testimony similarly would not have proven that the victim actually wielded the bat. While the witness's testimony might have served to rebut a claim that Mr. Miller recently fabricated the story of the bat, I am not persuaded that failure to call the witness prejudiced Mr. Miller.

(*Id.*, Ex. 12) (internal footnote omitted.)

The Court again finds the state courts' conclusions as to these claims neither contrary to, nor involving an unreasonable application of, clearly established federal law. As discussed below,

the state courts appropriately focused on the absence of prejudice resulting from Danko's failure to introduce the bat into evidence and/or to call Oxford as a rebuttal witness.

As noted by the Washington Court of Appeals, petitioner did not mention a baseball bat in the statement he provided to the police:

> At approximately 0700 am 3-23-99 there was a disagreement between myself, John Parezanin and Alex Romero over the way I was handling my divorce *and alcoholism*. [Italicized portion changed and initialed by petitioner.] The argument became heated when I threatened to go out and buy a bottle of wine. It turned into a screaming match between the two of them against me. John, who is a big fellow, blocked me at the door, denying my egress. He threatened that if I continued, he would cave my face in or crush my head in. I asked John and Alex to leave and they did not but continued to argue *with me*. [Italicized portion changed and initialed by petitioner.] They didn't want me to leave because they thought that I was seriously going to go out and buy alcohol.
>
> John kept me back physically. I walked across the living room [sic] and said theres [sic] a real simple way to get out the front door. I picked up the shotgun from behind the fireplace and said I'll make a hole big enough where I can walk through. The gun had 4 or 5 shells. While I was holding the shotgun, John took the shotgun away from me. [Initialed by petitioner.]
>
> After taking the shotgun away from me, I walked out the front door and drove off. I returned perhaps an hour later and they were not there.
>
> John and Alex had permission to be at my home. Alex stays there almost continuously and John *was* a good friend. [Italicized portion changed and initialed by petitioner.]
>
> I had nothing to drink this morning. My last drink was approximately 10:00 pm last night.

(*Id*., Ex. 19.) Nor, as reflected in the statement, did petitioner mention the bat upon being given the opportunity to make corrections. On redirect, Deputy Griffee testified that he never saw, discussed, or heard any discussion regarding a baseball bat, and that he would have taken any such item into evidence had he been informed of its existence and relevance to the case. (*Id*., Ex. 17 at 10:9-12:20.) No other witness testified to seeing or hearing about a bat on the day of the incident. Therefore, whether or not Danko had produced the bat itself, the above described evidence, or lack thereof, would have countered petitioner's contention that he acted in response to Parezanin's wielding of a baseball bat.

Likewise, given that she was not present at the time of the incident, additional testimony from Oxford would not have supported the assertion that Parezanin actually had a baseball bat in his hands. Oxford had already testified that petitioner told her about the bat. (*Id.*, Ex. 16 at 69:22-25.) However, during cross examination, Oxford did not dispute the assertion that petitioner did not describe the events of that day to her until months after the incident had occurred. (*Id*. at 67:8-69:25.) As such, Oxford would have, at best, served to rebut only the timing of the alleged fabrication. Petitioner fails to support the contention that the lack of this testimony prejudiced his case.

In sum, the Court concludes that neither the failure to produce the baseball bat, nor the failure to call Oxford as a rebuttal witness prejudiced petitioner's case. Accordingly, the Court recommends that petitioner be denied habeas relief as to his third and fourth claims for relief.

Diminished Capacity

Petitioner alleges Danko failed to adequately investigate the possible defense of diminished capacity based on the adverse side effects of various medications administered during petitioner's hospital stay. He further contests Danko's failure to present evidence that the continuing effect of those medications reduced his ability to think and perceive clearly.

On direct review, the Washington Court of Appeals considered and rejected petitioner's claim of ineffective assistance of counsel based on the failure to present a diminished capacity defense:

> Miller contends that his trial counsel's performance was deficient because he did not present a diminished capacity or voluntary intoxication defense, arguing that both Parezanin and the arresting officers believed that Miller was intoxicated. But Miller himself testified that he did not remember drinking, and his girlfriend testified that he had only two drinks over the course of the evening. Miller's counsel was not required to present a defense that was inconsistent with the testimony of the defense witnesses.
>
> Moreover, there was scant evidence to suggest that Miller's drinking affected his ability to form the requisite intent to commit the crime of assault in the second degree. Evidence of drinking is insufficient to warrant a voluntary intoxication defense instruction. An instruction should only be given if there is "substantial evidence of the effects of the alcohol on the defendant's mind or body." State v.

> Gabryschak, 83 Wn. App. 249, 253, 921 P.2d 549 (1996), quoting Safeco Ins. Co. v. McGrath, 63 Wn. App. 170, 179, 817 P.2d 861 (1991). Here, although witnesses testified that Miller was intoxicated, the arresting officers also testified that he was responsive to questioning and seemed "sharp." Miller himself made no claim that he was unable to form intent. Rather, he testified that he picked up the gun to create fear and apprehension in Parezanin, and that he intended to intimidate Parezanin.
>
> Miller also contends that his trial counsel was ineffective in failing to present a diminished capacity defense based on the fact that Miller had just been released from the hospital, where he had been given prescription drugs. The record below does not establish what drugs Miller was taking, or how those drugs may or may not have affected Miller's ability to form intent.
>
> Miller has moved to supplement the record to include a letter from Dr. Sean Killoran concerning Miller's ability to form intent based on his consumption of prescription drugs. Although Miller cites to RAP 10.3(a)(7) as a basis for supplementing the record, that rule is inapplicable. A motion to supplement the record should properly be brought under RAP 9.11, which provides that the appellate court may direct that additional evidence be taken only if the following six conditions are met: (1) additional proof of facts is needed to fairly resolve the issues on review; (2) the additional evidence would probably change the decision being reviewed; (3) it is equitable to excuse a party's failure to present the evidence to the trial court; (4) the remedy available to a party through post judgment motions in the trial court is inadequate or unnecessarily expensive; (5) the appellate court's remedy of granting a new trial is inadequate or unnecessarily expensive; and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.
>
> The six criteria have not been met. In particular, if the letter were made part of the record, it would not probably change the decision being reviewed (factor 2). As a preliminary matter, the letter from Dr. Killoran is not competent evidence. The letter was not signed under oath, nor does the letter establish that Dr. Killoran is competent to render the opinions contained therein. Moreover, Dr. Killoran's letter indicates that Miller was hospitalized and given medications for alcohol withdrawal syndrome. Testimony about these medications would have contradicted Miller's claim that he did not have a problem with alcohol. It was not unreasonable for defense counsel to not put on evidence that would run contrary to his client's testimony and damage his client's credibility.
>
> Moreover, the defense theory at trial was that Miller was reasonably defending himself against an attack by Parezanin. While self-defense and diminished capacity are not necessarily mutually exclusive defenses, it was not unreasonable for counsel to focus on one defense rather than presenting an alternate (and somewhat contradictory) theory. This is particularly so given that a diminished capacity defense was not supported by Miller's own version of events. We therefore deny Miller's motion to supplement the record, and hold that trial counsel was not ineffective for failing to present a diminished capacity defense.

(Dkt. 17, Ex. 4) (internal footnote omitted.)

In the letter submitted with petitioner's personal restraint petition, Danko stated:

> On the third question, as I tried to explain to you, Miller adamantly refused to pursue the diminished capacity defense. I believed this was his best defense, and told him very early in my representation of him that it could possibly lead to a resolution without trial. Between his intoxication, the effects of medication mixed with alcohol, and/or the withdrawal from medication and/or alcohol, and the combination of any of these, I believed an expert would be able to testify that Mr. Miller could not have formed the intent which was the gravamen of the charge. It would have made it possible to defend him and keep him off the stand, and I had grave reservations about his ability to testify on his own behalf and I discussed this with him. However, Mr. Miller rejected it out of hand. He interpreted diminished capacity as a personal attack on his intelligence and character. I did everything in my power to explain the defense, and enlisted Ms. Oxford's assistance. All of my efforts were to no avail, and I was forced to develop the theory presented at trial.

(*Id.*, Exs. 9a & 18.) By declaration, petitioner asserted that, after getting his signature on a medical release form, Danko never discussed the effects of the medications petitioner received during his hospitalization. (*Id.*, Ex. 9b.) Also, Dr. Sean Killoran reiterated his opinion by declaration, stating that, as a result of medications taken during the course of his hospitalization, petitioner was "profoundly compromised . . . in his capacity to make and sustain prudent decisions and intentions at the time of the charged offense." (*Id.*)

In considering petitioner's personal restraint petition, the Washington Court of Appeals held as follows:

> Next, Miller contends that his trial attorney was ineffective for failing to present evidence, or to explore the possibility of presenting evidence, on the potential negative effects of withdrawal from prescription medication on Miller's ability to think clearly. The difficulty with this line of reasoning is that Miller was hospitalized and given medication for alcohol withdrawal syndrome and significant liver damage. To present evidence regarding the details of Miller's hospitalization and medication would impeach Miller's testimony wherein he denied having an alcohol problem. As noted in Miller's direct appeal, it was not unreasonable for Miller's trial counsel to fail to put on evidence that would run contrary to his client's testimony and damage his client's credibility.

(*Id.*, Ex. 10.)

The Court finds the state courts' adjudication of these issues neither contrary to, nor involving an unreasonable application of, clearly established federal law. As noted by the Washington Court of Appeals, a diminished capacity defense – in focusing on the reasons for petitioner's hospitalization – would have contradicted petitioner's testimony that he was not an

alcoholic. (*Id.*, Ex. 16 at 116:19-118:19.) (*See also id.* at 70:24-71:25 (although conceding petitioner has a problem with alcohol, Oxford also testified that she did not believe petitioner was an alcoholic)). Given this contradiction, Danko's failure to present a diminished capacity defense cannot be said to fall below an objective standard of reasonableness. *See, e.g.*, *Bean v. Calderon*, 163 F.3d 1073, 1082 (9th Cir. 1998) (because a diminished capacity defense would have conflicted with the primary defense theory presented, "'it was within the broad range of professionally competent assistance'" for the trial attorney to not present that defense) (quoting *Correll v. Stewart*, 137 F.3d 1404, 1411 (9th Cir. 1998)).

Moreover, the Court finds unavailing petitioner's contention that, at the very least, Danko's failure to sufficiently investigate a diminished capacity defense constitutes deficient performance. It is undisputed that – as reflected in a letter from Danko seeking petitioner's medical records, provided to the state courts by petitioner's counsel (Dkt. 17, Ex. 9a.) – Danko undertook some investigation into petitioner's medical history. Petitioner further concedes that Danko was supplied with the requested records, which disclosed the medications petitioner received during his hospitalization. (*See* Dkt. 26 at 23-24.) This evidence bolsters Danko's assertion that he initially sought to pursue a diminished capacity defense. Thereafter, once Danko reasonably chose a defense theory, his duty to investigate a defense which would have contradicted the theory chosen came to an end. *See Bean*, 163 F.3d at 1082.

Petitioner fails to demonstrate that Danko's failure to further pursue and present a diminished capacity defense fell below an objective standard of reasonableness. As such, petitioner should be denied habeas relief as to his seventh and eighth grounds for relief.

Closing Argument

Petitioner raises several ineffective assistance of counsel claims pertaining to Danko's closing argument, including: (1) the erroneous statement that petitioner could not lawfully offer to use deadly force unless he had first been threatened with great bodily harm; (2) the failure to state that petitioner had the lawful right to use force to prevent an offense against his person; and

(3) the erroneous statement that the crime of assault was committed if petitioner picked up a gun and did anything threatening, thereby eliminating the element of intent to create fear or apprehension.

In considering Danko's closing argument on direct appeal, the Washington Court of Appeals stated as follows:

> Finally, Miller argues that his trial counsel was ineffective in misstating the law in closing argument. Miller's counsel stated that "[it is] assault if he picks up the gun and does anything threatening." He also stated that because Miller admitted wanting to intimidate Parezanin, "the issue here of intent is not significant . . ." He conceded that a "shotgun displayed in a threatening manner is sufficient to constitute assault two in the state of Washington in the law that's been give to you."
>
> Because second degree assault requires proof of the specific intent to create fear or apprehension of bodily harm, Miller's counsel did misstate the law. Viewing the record as a whole, it is apparent that this was not a tactical decision, and indeed, we are unable to conceive of how misstating the law and relieving the State of its burden of proof on a critical element of the charge could possibly amount to legitimate trial strategy. We therefore conclude that counsel's performance was deficient in this respect.
>
> This does not end our inquiry. Under the Strickland test, Miller must also demonstrate that he was prejudiced by his counsel's deficient performance. To demonstrate prejudice, a defendant must establish "that counsel's errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. In order to prevail on his ineffective assistance of counsel claim, Miller must demonstrate that there is a probability that the jury's verdict would have been different but for counsel's errors. State v. McFarland, 127 Wn.2d 322, 334-35, 89 P.2d 1251 (1995).
>
> It is certainly possible that a jury would have reached a different result had counsel not misstated the law. But we note that the jury was properly instructed on the intent element and, as discussed above, there was ample evidence for a reasonable jury to conclude that Miller had the specific intent to create fear or apprehension of bodily injury in Parezanin. We are therefore unable to say that it is *probable* that a jury would have acquitted Miller had his counsel given a more compelling closing argument. Because Miller has failed to demonstrate a reasonable probability that a jury would have reached a different result had his counsel not misstated the law, he has failed to demonstrate prejudice from his counsel's deficient performance.
>
> Under certain limited circumstances, a criminal defendant may not be required to demonstrate prejudice to establish ineffective assistance of counsel. For example, in United States v. Swanson, 943 F.2d 1070 (9th Cir. 1991), the court held that no proof of prejudice was required when defense counsel repeatedly conceded that prosecution had proved its case beyond a reasonable doubt. But this exception to the Strickland prejudice requirement only applies when "counsel entirely fails to subject the prosecution's case to adversarial testing." United States v. Cronic, 466 U.S. 648,

659, 104 S. Ct. 2039, 2047, 80 L. Ed. 2d 657 (1984). The Strickland standard normally applies to ineffective assistance of counsel claims; Cronic only applies to the narrow spectrum of cases where counsel's deficient performance amounts to an actual or constructive complete denial of counsel. See, e.g., Chadwick v. Green, 740 F.2d 897, 900 (11th Cir. 1984); Gochicoa v. Johnson, 238 F.3d 278, 283 (5th Cir. 2000), citing Strickland, 466 U.S. at 692-93.

Looking at the record as a whole, it is clear that Miller's counsel did not altogether abandon his defense of Miller. Although he misstated the law in closing argument, he also attempted to argue the alternate defense of lawful force. While his performance was deficient, he did not completely fail to subject the State's case to adversarial testing. Miller was therefore required to demonstrate prejudice. Because he has failed to do so, his ineffective assistance claim fails.

(Dkt. 17, Ex. 4.) In later dismissing petitioner's personal restraint petition, the Washington Court of Appeals stated as to this issue:

Miller also argues that his attorney was ineffective for misstating the law in his closing argument. This precise issue was rejected in Miller's direct appeal. Miller has not demonstrated that the ends of justice require that this claim be relitigated. [4] Moreover, this claim is premised almost exclusively on the declaration of an "expert" who opines that Miller's trial counsel misstated the law. "Since the determination of whether an attorney erred raises a question of law, the opinions of expert witnesses on the issues are irrelevant." Halvorsen v. Ferguson, 46 Wn. App. 708, 713, 735 P.2d 675 (1986) (quoting Ronald E. Mallen & Victor B. Levit, Legal Malpractice sec. 659, at 820-21 (2d ed. 1981) (footnotes omitted)).

(*Id.*, Ex. 10.) Finally, in denying petitioner's request for discretionary review, the Washington Supreme Court found as follows:

On the question of defense counsel's closing argument, the Acting Chief Judge determined that Mr. Miller's argument on this point had been rejected on direct appeal. Mr. Miller contends the Acting Chief Judge was wrong. It does appear that the claim Mr. Miller made in his petition is not precisely the same as the one he made on direct appeal. In his appeal, Mr. Miller argued counsel was ineffective in commenting that Mr. Miller would be guilty of assault if he picked up the shotgun and did anything threatening with it. Here, Mr. Miller urges counsel erred in suggesting Mr. Miller could not act in self-defense unless he was actually threatened with great bodily harm. But even considering the merits, counsel did not explicitly say there must be an "actual" threat of bodily harm. Mr. Miller concedes that the trial court correctly instructed the jury on this point of law. He demonstrates neither error nor prejudice.

(*Id.*, Ex. 12.)

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[4] See In re Barn, 134 Wn.2d 868, 885, 952 P.2d 116 (1998) ("[I]n order to renew any claim that was rejected on the merits on appeal, the [petitioner] must show that the ends of justice would be served by reexamining the issue.")

Again, the Court finds the state courts' resolution of these issues neither contrary to, nor involving an unreasonable application of, clearly established federal law. As discussed below, petitioner fails to demonstrate any prejudice resulting from Danko's misstatement of the definition of assault, nor any error or prejudice with respect to Danko's comments on the lawful use of force.

The trial court instructed the jury that attorneys' remarks, statements, and arguments were not evidence, and should be disregarded if not supported by the evidence or law as stated by the court. (*Id*., Ex. 20.) The trial court also provided proper instructions on the lawful use of force and the elements of an assault. (*Id*.) The assault instruction properly included the element of intent:

> An assault is an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury and which in fact creates in another a reasonable apprehension and fear of bodily injury even though the act did not actually intend to inflict bodily injury.

(*Id*. (Instruction No. 6.)) The trial court also issued an appropriate lawful use of force instruction:

> It is a defense to a charge of assault that the force used or offered to be used was lawful as defined in this instruction.
>
> The use of or offer to use force upon or toward the person of another is lawful when used or offered by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person and when the force is not more than is necessary.
>
> . . .

(*Id*. (Instruction No. 11.)) Additional instructions stated:

> It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.
>
> . . .
>
> A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be

lawful.

(*Id*. (Instruction Nos. 12 & 13.))

Petitioner admittedly brandished a shotgun and conceded that, in so doing, he intended to create fear and apprehension on the part of Parezanin. (*Id*., Ex. 16 at 129:3-11 (petitioner answered "That's correct" in response to the following question: "And in fact, the reason you picked up the gun was to create fear and apprehension on the person blocking your egress, leaving the house; isn't that right?")) Taking this concession in conjunction with the jury instruction proffered, the misstating of the definition of an assault by Danko cannot be said to have prejudiced the outcome of petitioner's case.

After misstating the definition of assault, Danko focused his closing on petitioner's lawful use of force. (*Id*., Ex. 17 at 37-41.) He asserted that petitioner's use of force was lawful based on the threat posed by Parezanin:

> And there were the threats that he told Officer Massey, I forget exactly the words that he used, you'll have the exhibit, the business about denying my egress, he threatened that if I continued he would cave my face in or crush my head in.
>
> . . .
>
> And again, yes, he didn't say there's a bat to the officer, but he does indicate that he was threatened, and it was not the threat of not being allowed out, the crushing, that language in the statement, that is apparent to Mr. Miller, and it's the display at that particular time and the response to that threat that makes the use of the shotgun, loaded or unloaded, lawful.
>
> . . .
>
> And the threats from Mr. Parezanin with the bat justifies what Mr. Miller did, and I ask that you do in fact find Mr. Miller not guilty based on his lawful act.

(*Id*. at 38:12-19, 40:19-25, and 41:19-21.) Therefore, Danko did argue that petitioner had the right to use force to prevent an offense against his person. Petitioner argues Danko should have also argued lawful use of force in preventing the offense of unlawful imprisonment. However, the Court does not find the omission of this additional argument objectively unreasonable given Danko's focus on the use of force in response to the physical threat posed by Parezanin.

Nor does the Court find performance below an objective standard of reasonableness or prejudice stemming from Danko's comment as to great bodily harm. As noted by the Washington Supreme Court, Danko never stated that there must be an "actual" threat of bodily harm:

> To make sure that there isn't any confusion, the use of that shotgun as it was used must be in response to the threat of bodily harm, great bodily harm, those instructions. In my enthusiasm I, in fact, misstated, it's not the words themselves, it is that display, and I surely don't – I apologize for the error, as he's standing there.

(*Id*. at 40:12-18.) As indicated, Danko was attempting to correct his earlier implication that petitioner's use of force was lawful simply due to the fact that Parezanin said he would not allow petitioner to leave the premises. Considering this isolated comment in the context of the entirety of Danko's closing argument and the jury instructions proffered, Danko's failure to clarify that petitioner needed only to reasonably and in good faith fear great bodily harm was neither objectively unreasonable, nor prejudicial.

In sum, the Court concludes that petitioner fails to demonstrate ineffective assistance of counsel based on Danko's closing argument. Therefore, the Court recommends that petitioner be denied habeas relief as to his fifth, sixth, and ninth grounds for relief.

Cumulative Effect of Errors

Petitioner asserts that all of his trial counsel's errors should be analyzed together to determine whether the cumulative effect deprived him of his right to effective assistance of counsel. *See Sanders*, 342 F.2d at 999 ("When we examine whether trial counsel gave effective assistance, we examine all aspects of the counsel's performance at different stages, from pretrial proceedings through trial and sentencing. Separate errors by counsel at trial and at sentencing should be analyzed together to see whether their cumulative effect deprived the defendant of his right to effective assistance.") (citations omitted). The Court clarifies that, considered individually or cumulatively, for the various reasons described above, petitioner fails to establish ineffective assistance of counsel.

/ / /

VI

For the reasons described above, petitioner's habeas petition, as well as his request for an evidentiary hearing and motion for discovery, should be denied, and this action dismissed. A proposed Order of Dismissal accompanies this Report and Recommendation.

DATED this 14th day of October, 2004.

s/ MARY ALICE THEILER
United States Magistrate Judge